

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

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No. 748.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM LADENOWICH.

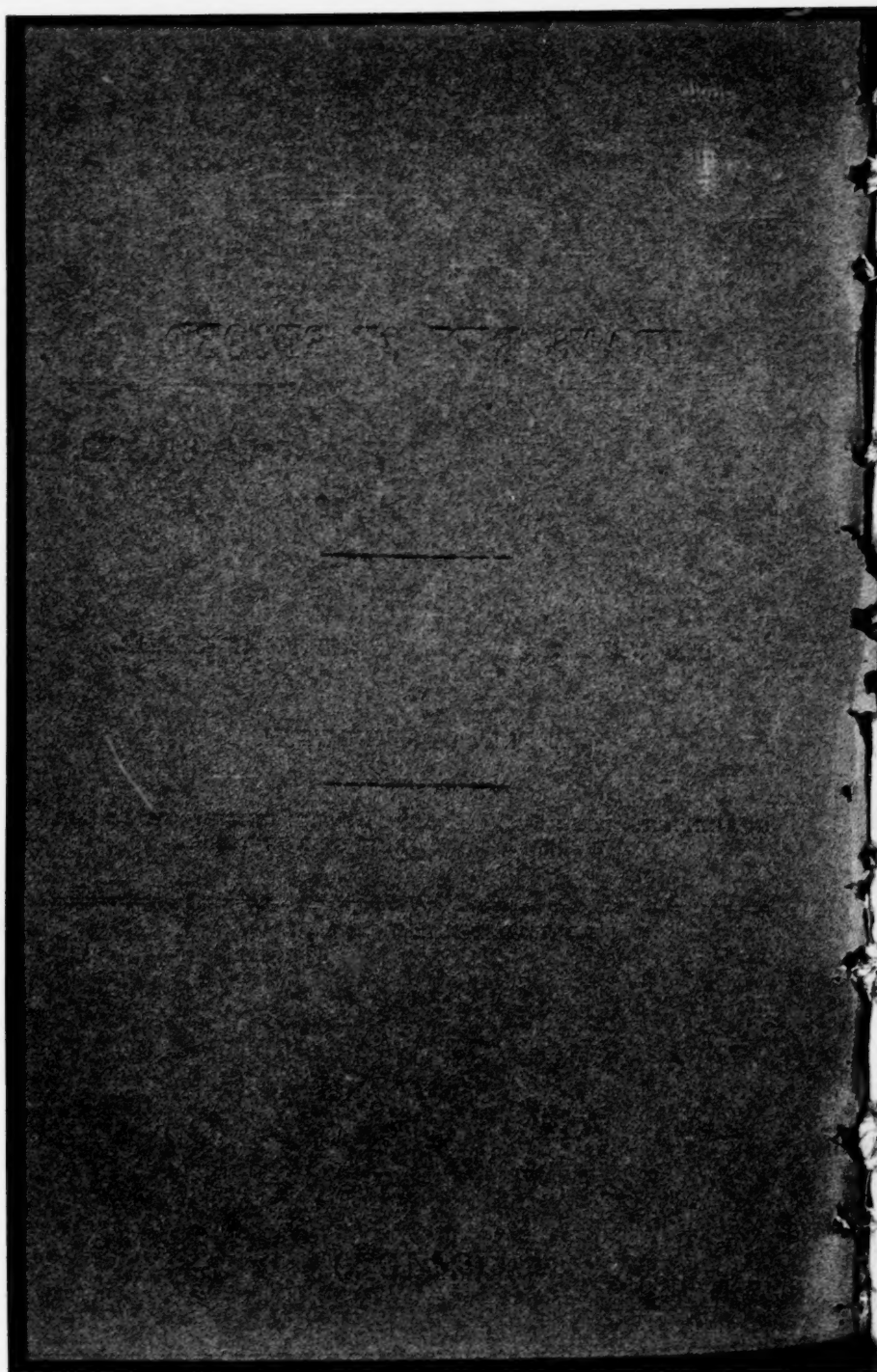
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ON WRIT OF HABEAS CORPUS TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED FOR RECORD IN 1914.

(24482)



# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 748.

THE UNITED STATES, PLAINTIFF IN ERROR,

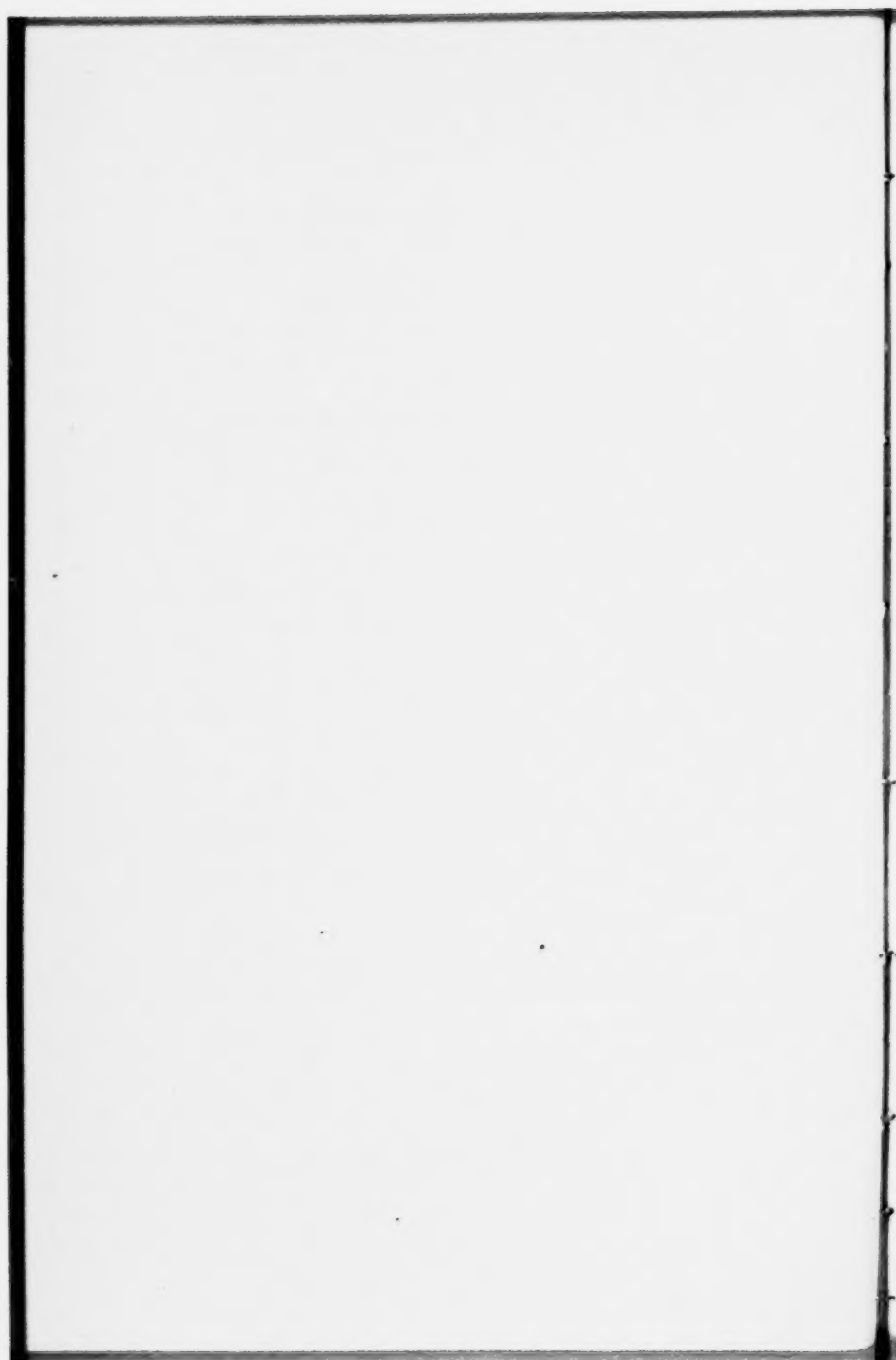
vs.

WILLIAM RABINOWICH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES DISTRICT COURT,  
*Southern District of New York.*

UNITED STATES OF AMERICA	} Stipulation as to record.
<i>vs.</i>	
WILLIAM RABINOWITCH ET AL.	

It is hereby stipulated by and between counsel for the United States of America and counsel for the above-named defendant that the following papers shall constitute the record in the writ of error heretofore sued out in the above-entitled case by the United States of America, and that the clerk shall incorporate only such papers in the transcript of the record for the Supreme Court, to wit:

1. The indictment.
2. Special plea in bar of the defendant.
3. Demurrer of the United States of America to the defendant's special plea in bar.
4. Order for judgment, dismissing indictment against the said defendant.
5. The judgment of the court dismissing the indictment against the said defendant.
6. Petition for writ of error and order.
7. Assignments of error.
8. Writ of error.
9. Citation.

This 9th day of December, 1914.

H. SNOWDEN MARSHALL,  
*United States Attorney.*

ROGER B. WOOD,  
SAMUEL HERSHENSTEIN,  
*Assistant U. S. Attorneys.*

ERNEST E. BALDWIN,  
*Attorney for William Rabinowitch.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Dec. 10, 1914.

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INDICTMENT.

In the District Court of the United States of America for the Southern District of New York, in the second circuit.—Of the June term in the year nineteen hundred and twelve.

SOUTHERN DISTRICT OF NEW YORK, ss:

The grand jurors for the United States of America, empanelled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that district, upon their oaths present, that on the first day of March, 1911, Jacob Klein, Morris Rosner, and Samuel Falk were trading and doing business

at No. 26 Washington Place, in the borough of Manhattan, city of New York and Southern District of New York, as copartners under the firm name and style of Klein, Rosner & Company; that on said first day of March, 1911, said firm had on its premises a large quantity of clothing, but the exact amount and value thereof are to the grand jurors unknown; that on the said first day of March, 1911, at the city of New York and Southern District of New York, Jacob Klein, Morris, Rosner, Samuel Falk, aforesaid, and Minnie Klein Louis Wilson, and William Rabinowich, and divers other persons whose names are to the grand jurors unknown, late of the city and county of New York, in the district and circuit aforesaid, then and there contemplated, anticipated, and planned that said Jacob Klein, Morris Rosner, and Samuel Falk, doing business as aforesaid, should commit an act of bankruptcy, that is to say, should remove from the premises where they were then and there conducting the business of said firm of Klein, Rosner & Company, as aforesaid, and conceal a part of the property of said copartnership, to wit, a large

3 quantity of clothing, a more exact description of which is to the grand jurors unknown, with intent to defraud their creditors; that an involuntary petition in bankruptcy should thereafter be filed against said Jacob Klein, Morris Rosner, and Samuel Falk, individually and as copartners, doing business under said name of Klein, Rosner & Company, by creditors of said Jacob Klein, Morris Rosner, and Samuel Falk, trading and doing business as aforesaid; that thereafter said Jacob Klein, Morris Rosner, and Samuel Falk, individually and as copartners as aforesaid, should be adjudged bankrupts; and that thereafter a trustee should be appointed in said bankruptcy proceedings of the estate in bankruptcy of said Jacob Klein, Morris Rosner, and Samuel Falk, trading and doing business as aforesaid.

And the grand jurors aforesaid, on their oaths aforesaid, do further present, that the said Jacob Klein, Morris Rosner, Samuel Falk, Minnie Klein, Louis Wilson, and William Rabinowich, and said divers other persons whose names are to the grand jurors unknown, late of the city and county of New York, in the district and circuit aforesaid, heretofore, to wit, on the first day of March, 1911, in the city of New York, Southern District of New York, and within the jurisdiction of this court, under the circumstances aforesaid, and contemplating and anticipating as aforesaid, willfully and unlawfully conspired together and with divers other persons to the grand jurors unknown, to commit an offense against the United States; that is to say, that the said Jacob Klein, Morris Rosner, Samuel Falk, Minnie Klein, Louis Wilson, and William Rabinowich, and said divers other persons, unlawfully and willfully conspired and corruptly and fraudulently agreed together that the said Jacob

Klein, Morris Rosner, and Samuel Falk should conceal, while  
4 they, the said Jacob Klein, Morris Rosner, and Samuel Falk, individually and copartners as aforesaid, should be bankrupts as aforesaid, from the trustee of the said estate in bankruptcy

aforesaid, certain property which would then and there belong to said estate in bankruptcy, to wit, said clothing, and the money and property for which the said clothing might thereafter be sold and exchanged, and money and property to be thereafter collected by said conspirators in payment of certain accounts receivable, a more exact description of which is to the grand jury unknown, then and there due to said Jacob Klein, Morris Rosner, and Samuel Falk, trading and doing business under the firm name of Klein, Rosner & Company, as aforesaid.

And in pursuance of and to effect the object of said conspiracy, Jacob Klein, Morris Rosner, Samuel Falk, Minnie Klein, Louis Wilson, and William Rabinowich, on the 10th day of March, 1911, assisted and took part in the removal from No. 26, Washington Place, Borough of Manhattan, in the city of New York, of certain goods, to wit, certain bundles of clothing, a more exact description of which is to the grand jurors unknown, then and there the property of said Jacob Klein, Morris Rosner, and Samuel Falk, trading and doing business as aforesaid, and which in due course would belong to said estate in bankruptcy, as said conspirators then and there well knew.

And further in pursuance of and to effect the object of said conspiracy, said Louis Wilson and William Rabinowich on the 18th day of March, 1911, removed certain books of account of said Jacob Klein, Morris Rosner, and Samuel Falk, doing business under the firm name of said Klein, Rosner, and Company, from No. 26 Washington Place, city of New York and Southern District of New York, to the Broadway Central Hotel, in said city of New York.

5 And further, in pursuance of and to effect the object of said conspiracy, said Louis Wilson, on the 4th day of April, 1911, went to the city of Buffalo, in the State of New York, and there concealed himself for twelve months.

Against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

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*Second count.*

And the grand jurors aforesaid, on their oaths aforesaid, do further present, that on the twenty-second day of March, 1911, a petition in bankruptcy signed by Solomon Wallach, Moe Smith, and Aaron Rosin, creditors of Jacob Klein, Morris Rosner, and Samuel Falk, copartners, trading and doing business at No. 26 Washington Place, city of New York and Southern District of New York, under the firm name and style of Klein, Rosner & Company, was duly filed, pursuant to the acts of Congress relating to bankruptcy, in the District Court of the United States for the Southern District of New York, by Samuel S. Breslin, attorney for said creditors, praying that said Jacob Klein, Morris Rosner, and Samuel Falk should be adjudged to be bankrupts, as copartners and as individuals; that on

the twenty-second day of March, 1911, George J. Thomson was duly appointed temporary receiver of the assets and effects of said Jacob Klein, Morris Rosner, and Samuel Falk, individually and as copartners, trading and doing business under the firm name and style of Klein, Rosner & Company as aforesaid, and duly qualified as such; that on the twenty-second day of March, 1911, Jacob Klein, Morris Rosner, Samuel Falk, aforesaid, and Minnie Klein, Louis Wilson, and William Rabinowich, then and there contemplated and anticipated that said Jacob Klein, Morris Rosner, and Samuel Falk would thereafter be adjudged bankrupts, individually and as copartners, trading and doing business under the firm name of Klein, Rosner & Company; that thereafter a trustee would be appointed in said bankruptcy proceedings of the estate in bankruptcy of said Jacob Klein, Morris Rosner, and Samuel Falk, individually and as copartners as aforesaid.

7 And the grand jurors aforesaid, on their oaths aforesaid, do further present that said Jacob Klein, Morris Rosner, Samuel Falk, Minnie Klein, Louis Wilson, and William Rabinowich, late of the city and county of New York, in the district and circuit aforesaid, heretofore, to wit, on the twenty-second day of March, 1911, at the county of New York, city of New York, Southern District of New York, under the circumstances aforesaid, and contemplating and anticipating as aforesaid, willfully and unlawfully conspired together and with divers others persons to the grand jurors unknown to commit an offense against the United States, that is to say, that said Jacob Klein, Morris Rosner, Samuel Falk, Minnie Klein, Louis Wilson, and William Rabinowich, and said divers other persons, unlawfully and willfully conspired and corruptly and fraudulently agreed together that said Jacob Klein, Morris Rosner, and Samuel Falk knowingly and fraudulently should conceal, while they, the said Jacob Klein, Morris Rosner, and Samuel Falk, individually and as copartners as aforesaid, should be bankrupts as aforesaid, from the trustee of said estate in bankruptcy aforesaid, certain property which would then and there belong to said estate in bankruptcy, to wit, a large quantity of clothing, a more exact description of which is to the grand jurors unknown, money, and property for which certain of said clothing might thereafter be sold or exchanged, and money and property to be collected by said conspirators in payment of accounts receivable, a more exact description of which is to the grand jurors unknown, then and there due to said estate in bankruptcy.

And in pursuance of and to effect the object of said conspiracy, said conspirators concealed on said March 24th, 1911, and  
8 thereafter continued to conceal the books of account of said Jacob Klein, Morris Rosner, and Samuel Falk, trading and doing business as copartners as aforesaid.

And further in pursuance of and to effect the object of said conspiracy, said Louis Wilson, on the 4th day of April, 1911, concealed

himself at the city of Buffalo, in the State of New York, and continued to conceal himself for twelve months.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

HENRY A. WISE,  
*United States Attorney.*

(Endorsed) U. S. District Court.—The United States of America vs. William Rabinowich and others.—Indictment.—Conspiracy to conceal from trustee the property of bankrupts. Sec. 37, U. S. C. C.—Henry A. Wise, U. S. attorney.—A true bill, Eugene Galland, foreman.—U. S. District Court, S. D. of N. Y., filed Jun. 24, 1912.

1912.

June 25. Rabinowich pleads not guilty; bail, \$2,500.

July 1. Jacob Klein, Saml. Falk, Morris Rosner, arraigned, plead not guilty; bail, \$1,000 each. Aug. 1 to withdraw.

1914.

Nov. 10. Filed demurrer of Wm. Rabinowich.

Nov. 10. Filed mo. to quash.

Nov. 11. Filed plea in abatement.

Nov. 13. Filed demurrer to defts. plea in abatement.

Nov. 25. Filed judgment overruling demurrer and sustaining special plea in bar. Judge Hough.

Dec. 8. Filed appeal to U. S. Supreme Court.

9

DEMURRER TO INDICTMENT.

DISTRICT COURT OF THE UNITED STATES,  
*Southern District of New York.*

UNITED STATES OF AMERICA }  
vs. }  
WILLIAM RABINOWICH ET AL. }

The defendant, William Rabinowich, by Ernest E. Baldwin, his attorney, demurs to the indictment herein upon the ground that neither the said indictment nor any count thereof as appears upon the face thereof, states facts sufficient to constitute an offense against the laws of the United States.

Wherefore the defendant, William Rabinowich, prays judgment that the indictment be dismissed.

ERNEST E. BALDWIN,  
*Attorney for the Defendant, William Rabinowich.*

(Office and post-office address, 42 Broadway, Manhattan Borough, New York City.)

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Nov. 19, 1914.

UNITED STATES DISTRICT COURT,

*Southern District of New York.*

UNITED STATES OF AMERICA }

*v.*

WILLIAM RABINOWICH ET AL. }

Now comes the defendant, William Rabinowich, by his counsel, and moves the court to quash the indictment and each count thereof, upon the ground that it appears upon the face of each of said counts that the alleged offense in each respectively set forth is barred by the statute of limitations contained in section 29-D of the bankruptcy act, more particularly known as "An act to establish a uniform system of bankruptcy throughout the United States," in that the indictment was not found within one year after the commission of the alleged offense set forth in each of said counts.

Wherefore he prays judgment that he may be dismissed and discharged by this court from the said premises in said indictment contained.

ERNEST E. BALDWIN,

*Attorney for the Defendant, William Rabinowich.*

(Office and post-office address, 42 Broadway, Manhattan Borough, New York City.)

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Nov. 10, 1914.

11 DISTRICT COURT OF THE UNITED STATES,

*Southern District of New York.*

UNITED STATES OF AMERICA }

*vs.*

WILLIAM RABINOWICH ET AL. }

Plea in abatement.

Now comes the said William Rabinowich in his own proper person into court and having heard read the indictment herein against him and others, says that the United States ought not to further prosecute the indictment against him, because the alleged offense in each count therein contained is barred by the statute of limitations contained in section 29-D of the bankruptcy act, more particularly known as "An act to establish a uniform system of bankruptcy throughout the United States," in that the indictment was not found within one year after the commission of the alleged offense set forth in each of said counts.

Wherefore he prays that the said indictment be dismissed and he be discharged from said premises in said indictment above specified.

ERNEST E. BALDWIN,

*Attorney for Defendant, William Rabinowich.*

(Office & post-office address, 42 Broadway, Manhattan Borough, New York City.)

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Nov. 11, 1914.

12 DISTRICT COURT OF THE UNITED STATES,  
*Southern District of New York.*

UNITED STATES OF AMERICA	} Demurrer to plea in abatement.
<i>vs.</i>	
WILLIAM RABINOWICH ET AL.	

Now comes the United States of America, by H. Snowden Marshall, United States attorney for the Southern District of New York, and Roger B. Wood and Samuel Hershenstein, assistant United States attorneys for the Southern District of New York, and demurs to the defendant's (William Rabinowich) plea in abatement to the indictment herein, for the following reason, to wit, that the facts as set forth therein are insufficient in law to constitute a bar to the prosecution of the indictment herein.

Wherefore the United States of America demands judgment that the plea in abatement of the defendant, William Rabinowich, is insufficient in law and be overruled, and that the United States of America have such other and further relief as to the court may seem proper.

H. SNOWDEN MARSHALL,

*U. S. Attorney for the Southern District of New York.*

ROGER B. WOOD,

SAMUEL HERSHENSTEIN,

*Assistant U. S. Attorneys.*

Due and legal service of the foregoing demurrer to plea in abatement acknowledged and all other and further service waived.

ERNEST E. BALDWIN,

*Attorney for Defendant, William Rabinowich.*

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Nov. 13, 1914.

13 ORDER FOR JUDGMENT.

At a stated term of the United States District Court for the Southern District of New York, held at the Woolworth Building on the 24th day of November, 1914.

UNITED STATES OF AMERICA, PLAINTIFF,	} Before Hon. Charles M. Hough, U. S. D. J., presiding.
<i>vs.</i>	
WILLIAM RABINOWICH ET AL., DEFENDANTS.	

The United States grand jury for the Southern District of New York having, on the 24th day of June, 1912, returned an indictment against the above-named defendant, and a special plea in bar to said



indictment having been served and filed by the said defendant on the ground that the prosecution for the offense charged in the said indictment was barred by the statute of limitations as contained in section 29-D of the United States bankruptcy act, and the United States of America having duly served and filed a demurrer to the special plea in bar of the said defendant for the reason that the said plea in abatement was insufficient in law, and the said defendant having served joinder in demurrer and noticed the issues on said demurrer and joinder for argument, and the said issues having duly come on to be heard, and after hearing the arguments of counsel for the United States and counsel for the defendant.

Now, upon the motion of Ernest E. Baldwin, attorney for defendant, it is

Ordered, that said demurrer interposed by the United States of America to said special plea in bar of the said defendant be, and the same is hereby, overruled and the said special plea in bar  
14 is sustained as sufficient in law on the ground that the charge in the indictment herein is barred by the statute of limitation as contained in section 29-D of the United States bankruptcy act; that although the indictment herein charges a conspiracy to commit an offense against the United States under section 37 of the United States Criminal Code, the offense being an offense under section 29-B of the United States bankruptcy act, the statute of limitations which governs the charge in said indictment is not section 1044 of the Revised Statutes, but section 29-D of the United States bankruptcy act; therefore the indictment herein is insufficient, upon my construction of the statutes upon which it is based, to wit, section 37 of the United States Criminal Code, 29-B and 29-D of the United States bankruptcy act, and section 1044 of the Revised Statutes.

Further ordered that judgment be entered overruling the demurrer of the United States of America to said special plea in bar and sustaining said special plea in bar as sufficient in law, and dismissing as to the said defendant the indictment so found and filed, &c.

C. M. HOUGH,

*U. S. D. J.*

Approved as to form, Nov. 24th, 1914.

E. E. BALDWIN.

Due and legal service of the foregoing order for judgment acknowledged and all other and further service waived.

ERNEST E. BALDWIN,

*Attorney for defendant.*

(Endorsed) U. S. District Court, S. D. of N. Y., Filed Nov. 25, 1914.



15 UNITED STATES DISTRICT COURT,  
*Southern District of New York.*

UNITED STATES OF AMERICA	}	Judgment overruling demurrer to de-
<i>v.</i>		
WILLIAM RABINOWICH ET AL.		
		endants' special plea in bar.

The United States grand jury for the Southern district of New York on the 24th day of June, 1912, returned an indictment against the above-named defendant and a special plea in bar to said indictment having been served and filed by the said defendant on the ground that the prosecution for the offence charged in the said indictment was barred by the statute of limitations as contained in §29-d of the United States bankruptcy act, and the United States of America having duly served and filed a demurrer to the special plea in bar of the said defendant for the reason that the said plea in abatement was insufficient in law, and the said defendant having served joinder in demurrer and noticed the issues on said demurrer and joinder for argument, and the said issues having duly come on to be heard, and after hearing the arguments of counsel for the United States and counsel for the defendant,

Now, upon the motion of Ernest E. Baldwin, attorney for the defendant, it is

*Ordered*, that said demurrer interposed by the United States of America to said special plea in bar of the said defendant be  
16 and the same is hereby overruled and the said special plea in bar is sustained as sufficient in law and that the indictment so found and filed against the said defendant on the 24th day of June, 1912, be, and the same is hereby, dismissed.

C. M. HOUGH,  
*U. S. D. J.*

Due and legal service of the foregoing judgment acknowledged and all other and further service waived.

ERNEST E. BALDWIN,  
*Attorney for the defendant.*

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Dec. 8, 1914.

17 ASSIGNMENTS OF ERROR.

UNITED STATES DISTRICT COURT,  
*Southern District of New York.*

UNITED STATES OF AMERICA	}	Assignments of error.
<i>v.</i>		
WILLIAM RABINOWITCH ET AL.		

Now comes the United States of America, by H. Snowden Marshall, United States attorney for the Southern District of New York,

and Roger B. Wood and Samuel Hershenstein, assistant United States attorneys for the Southern District of New York, and in connection with its petition for a writ of error makes the following assignments of error, which it avers occurred upon the hearing in this case, to wit:

First. In view of the charge contained in the indictment in this case, the court erred in entering judgment in favor of the defendant and overruling the demurrer of the United States to said defendant's special plea in bar, and in quashing the said indictment against the said defendant.

Second. In view of the charge contained in the indictment in this case, the court erred in holding and deciding that the charge of conspiracy to conceal assets from a trustee in bankruptcy was governed by the Statute of Limitations contained in subdivision D of §29b of the United States bankruptcy act.

Third. In view of the charge contained in the indictment in this case, the court erred in holding and deciding that the limitation within which period of time a prosecution for conspiracy to conceal assets from a trustee in bankruptcy could be instituted was not governed by §1044 of the Revised Statutes.

Fourth. In view of the charge contained in the indictment in this case, the court erred in holding and deciding that an indictment charging a conspiracy to conceal assets from a trustee in bankruptcy, although the charge was a charge under §37 of the United States Criminal Code, that because of the phraseology of subdivision D of §29-b of the bankruptcy act, which is as follows:

\* \* \* \* \*

"D. A person shall not be prosecuted for any offence arising under this act unless the indictment is found or the information is filed in court one year after the commission of the offence."

was governed by the limitation provided for in subdivision D of §29-b of the United States bankruptcy act and not by the limitation provided for in §1044 of the Revised Statutes of the United States.

Wherefore the United States of America prays that the judgment of the said District Court of the United States for the Southern District of New York be, under the act of Congress approved March 2nd, 1907, reviewed by the Supreme Court of the United States and said judgment be reversed.

H. SNOWDEN MARSHALL,  
*U. S. Attorney.*

ROGER B. WOOD,  
SAMUEL HERSHENSTEIN,  
*Asst. U. S. Attorneys.*

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Dec. 8, 1914.

19

## PETITION FOR WRIT OF ERROR.

UNITED STATES DISTRICT COURT,  
*Southern District of New York.*

THE UNITED STATES OF AMERICA, PLAINTIFF,	}
Plaintiff-in-error,	
<i>vs.</i>	
WILLIAM RABINOWICH, DEFENDANT.	

Now comes the United States of America, by its attorney, H. Snowden Marshall, and complains that in the record and proceedings had in this cause, and in the judgment sustaining the defendant's special plea in bar and overruling the plaintiff's demurrer to said special plea in bar, which order and judgment were duly made and filed in the office of the clerk of the United States District Court for the Southern District of New York on the 8th day of December, 1914, a manifest error hath happened, as will appear in the assignment of errors herewith submitted.

Wherefore the United States of America prays for the allowance of a writ of error, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated, New York, N. Y., December 8th, 1914.

H. SNOWDEN MARSHALL,  
*U. S. Attorney for the Southern District of New York,*  
*Attorney for Petitioner.*

ROGER B. WOOD,  
 SAMUEL HERSHENSTEIN,  
*Assistant U. S. Attorneys.*

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Dec. 8, 1914.

20 THE UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the honorable the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court of the United States for the Southern District of New York, in the Second Circuit, before you or some of you, between the United States of America and William Rabinowich, a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears:

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days of the date hereof; that the record and proceedings aforesaid being accepted, the said Supreme Court may cause further to be done therein to correct that error, what by right and according to the laws and customs of the United States should be done.

21       Witness, the Honorable Edward D. White, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and fourteen.

ALEX. GILCHRIST, JR.,

*Clerk District Court of the United States  
for the Southern District of New York.*

The foregoing writ is hereby allowed. Dated, New York, N. Y., December 8th, 1914.

C. M. HAUGH,

*United States District Judge for the  
Southern District of New York.*

22       Form No. 336.—U. S. District Court, Southern District of New York.—United States of America versus William Rabinowich.—Writ of error.—H. Snowden Marshall, United States attorney, attorney for U. S.—Due service of a copy of the within is hereby admitted.—U. S. District Court, S. D. of N. Y. Filed Dec. 8, 1914.]

23

CITATION.

By the honorable CHARLES M. HOUGH, one of the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit. To William Rabinowich, greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden in the City of Washington, in the District of Columbia, on the 6th day of January, 1915, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the district and circuit above named, this 8th day of December, in the year of our Lord one thousand nine hundred

and fourteen, and of the independence of the United States the one hundred and thirty-ninth.

[SEAL.]

C. M. HOUGH,

*Judge of the District Court of the United States for the Southern District of New York, in the second circuit.*

24 [Form No. 336.—U. S. District Court, Southern District of New York.—United States of America versus William Rabinowich.—Citation.—H. Snowden Marshall, United States attorney, attorney for U. S.—Due service of a copy of the within is hereby admitted. New York, December 9, 1914. E. E. Baldwin, attorney for deft.—U. S. District Court, S. D. of N. Y. Filed Dec. 10, 1914.]

25 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	}
<i>vs.</i>	
WILLIAM RABINOWICH, DEFENDANT IN ERROR.	

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern District of New York, this 28th day of December, in the year of our Lord one thousand nine hundred and fourteen, and of the independence of the said United States the one hundred and thirty-ninth.

[SEAL.]

ALEX. GILCHRIST, JR.,

*Clerk.*

(Indorsement on cover:) File No. 24492. S. New York, D. C. U. S. Term No. 748. The United States, plaintiff in error, vs. William Rabinowich. Filed December 29th, 1914 File No. 24492.

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 748.
v.	
WILLIAM RABINOWICH ET AL.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

## MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and, in accordance with the provisions of the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court during the present term.

This was a prosecution for conspiracy to commit an offense against the United States, in violation of section 37 of the Criminal Code.

The indictment contained two counts. The first count charged the defendant and others with conspiracy to commit an offense against the United States, to wit, to conceal certain property, etc., from the assets of an *anticipated* bankrupt, in violation of section 29*b* of the Bankruptcy Act.

The second count is identical in so far as the charge of conspiracy is concerned and differs only from the first count in that it charged the conspiracy as of the date on which the petition in bankruptcy was filed

and the alleged debtors adjudged bankrupts, and that it omitted one of the overt acts alleged in the first count, and alleged the commission of another on a different date.

Defendant filed a special plea in bar on the ground that the offense charged in the indictment was barred by the statute of limitations contained in section 29*d* of the Bankruptcy Act. Demurrer to this plea was filed by the United States on the ground that it was insufficient in law to constitute a bar to the prosecution.

In overruling the demurrer and sustaining the special plea in bar, the court held that an indictment for a conspiracy to commit an offense against the United States under section 37 of the Criminal Code, the offense being an offense under section 29*b* of the Bankruptcy Act, is governed by the statute of limitations contained in section 29*d* of said act, which provides that a person shall not be prosecuted for a violation of that act unless the indictment or information is filed within *one year* after the commission of the offense, and *not* by section 1044 of the Revised Statutes, which provides that no person shall be prosecuted, etc., unless the proceedings shall have been instituted within a period of *three years* next after the commission of the offense.

Notice of this motion has been served upon opposing counsel.

JOHN W. DAVIS,  
*Solicitor General.*

JANUARY, 1915.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

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THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 748.
v.	
WILLIAM RABINOWICH.	

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

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## BRIEF FOR THE UNITED STATES.

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### THE FACTS.

This is a writ of error to the District Court of the United States for the Southern District of New York taken under the criminal appeals act of March 2, 1907 (34 Stat., 1246), to review a judgment sustaining a special plea in bar, upon demurrer to such plea. The indictment was founded upon Revised Statutes, section 5440 (now sec. 37 of the Federal Penal Code), for conspiracy to commit the offense defined by subdivision b (1) of section 29 of the Bankruptcy Act (30 Stat., 554). A special plea in bar set up the statute of limitations contained in subdivision d of section 29 of the bankruptcy Act.

The indictment contains two counts, both of which allege in substance that the defendants Klein, Rosner, Falk, Minnie Klein, Wilson, Rabinowich, and others unknown "contemplated, anticipated, and planned" that Klein, Rosner, and Falk, doing business as copartners under the firm name of Klein, Rosner & Company, should commit an act of bankruptcy by removing from the premises where they were doing business and concealing part of the property of the copartnership, consisting of a large quantity of clothing, with intent to defraud their creditors; that an involuntary petition in bankruptcy should thereafter be filed against Klein, Rosner, and Falk individually and as copartners; that they should be adjudged bankrupts, and that thereafter a trustee in bankruptcy should be appointed. The indictment further alleges that all of the persons named above "contemplating and anticipating as aforesaid, wilfully and unlawfully conspired together \* \* \* to commit an offense against the United States; that is to say, \* \* \* agreed together that the said Jacob Klein, Morris Rosner, and Samuel Falk should conceal, while they \* \* \* should be bankrupts" from the trustee in bankruptcy property which should belong to the bankrupt estate. The indictment then sets out certain overt acts committed "in pursuance of and to effect the object of said conspiracy." The two counts are similar in all respects except as to the overt acts alleged to have been committed to effect the object of the conspiracy.

**THE STATUTES.**

Rev. Stat., sec. 5440 (now sec. 37 of the Federal Penal Code), upon which the indictment is founded, is as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Section 29 of the Bankruptcy Act, so far as material, is as follows:

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy.

Subdivision d of the same section is as follows:

A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Section 1044 of the Revised Statutes is as follows:

No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-

six, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial, or punishment for any offense barred by the provisions of existing laws.

#### **SPECIFICATIONS OF ERROR.**

(1) In view of the charge contained in the indictment in this case, the court erred in entering judgment in favor of the defendant and overruling the demurrer of the United States to said defendant's special plea in bar and in quashing the said indictment against the said defendant.

(2) In view of the charge contained in the indictment in this case, the court erred in holding and deciding that the charge of conspiracy to conceal assets from a trustee in bankruptcy was governed by the statute of limitations contained in subdivision d of sec. 29 of the United States Bankruptcy Act.

(3) In view of the charge contained in the indictment in this case, the court erred in holding and deciding that the limitation within which period of time a prosecution for conspiracy to conceal assets from a trustee in bankruptcy could be instituted was not governed by sec. 1044 of the Revised Statutes.

(4) In view of the charge contained in the indictment in this case, the court erred in holding and deciding that an indictment charging a conspiracy to conceal assets from a trustee in bankruptcy, although the charge was a charge under sec. 37 of the United

States Penal Code, that because of the phraseology of subdivision d of sec. 29 of the Bankruptcy Act, which is as follows:

d. A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court one year after the commission of the offense—

was governed by the limitation provided for in subdivision d of sec. 29 of the United States Bankruptcy Act and not by the limitation provided for in sec. 1044 of the Revised Statutes of the United States.

#### THE QUESTION INVOLVED.

The specifications of error and the case present but a single question:

Is the offense of conspiracy to commit an offense defined by the Bankruptcy Act, an "offense arising under" that act, so as to be governed by the special one-year period of limitation imposed by that act, rather than by the three-year period of limitation provided for by Rev. Stat., sec. 1044, and applicable generally to Federal crimes?

The Government contends that a conspiracy to conceal assets from a trustee in bankruptcy is a distinct crime, independent of the Bankruptcy Act, and not arising thereunder; and that while the crime of concealing assets may be subject to the one-year limitation contained in the Bankruptcy Act, the crime of conspiracy so to conceal, not being "an offense arising under this act," is subject only to the general three-year period of limitation.



## THE ARGUMENT.

## I.

The context of section 29 of the bankruptcy act shows that only the offenses enumerated therein are to be deemed "offenses arising under" that act, within the meaning of subdivision d of section 29 of said act.

In order that this may be clear, section 29 is here set out in full exactly as it appears upon the statute books (30 Stat. 544; 554:)

SEC. 29. *Offenses.*—a. A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the

petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c. A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d. A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

It will be seen that subdivision d, which contains the special one-year limitation, is an integral part of section 29, the other subdivisions of which define those actions which shall be deemed offenses under the act. It seems too clear for argument that, in using the words "any offense arising under this act," in subdivision d, Congress was referring to the offenses which it had just designated in the preceding subdivisions and which comprise a complete enumeration

of actions which constitute offenses under the act, and that no offenses other than those named in the act can be considered "offenses arising under this act."

## II.

The offense of conspiracy, as defined by Rev. Stat., sec. 5440, (Federal Penal Code, sec. 37), although the object of such conspiracy be the commission of an offense defined and made punishable by the Bankruptcy Act, 30 Stat., 544, 554, is not an "offense arising under" the Bankruptcy Act, but a separate and distinct offense.

### A. *Introductory statement.*

The act of conspiring together for the purpose of violating the criminal laws has always been regarded by this Court and by the lower Federal courts as an offense entirely separate and distinct from any object which the conspiracy might seek to attain. That this was the intention of Congress is sufficiently clear from the language of the conspiracy statute, Rev. Stat., sec. 5440; but when this meaning has been affirmed and repeated without dissent by numerous judicial decisions, it can not now be questioned. This proposition stands unaffected by the controversy, which for many years remained open, as to whether the offense defined by section 5440 was complete (though not punishable) when the conspiracy was entered into, so as to start the statute of limitations running, or whether some overt act to effect the object of the conspiracy was necessary to complete the offense. That controversy must now be considered settled by this court in *Hyde v. United States*, 1912, 225 U. S., 347. The "gist" or "gravamen" of the offense, neverthe-

less, still remains the fact of conspiracy. The conspiring together to do an unlawful thing constitutes the menace to society aimed at by the statute; and if some act however slight be done by one of the conspirators in furtherance of the conspiracy, the offense is complete as to all the conspirators.

*B. Authorities directly in point.*

*United States v. Hirsch*, 1879, 100 U. S. 33. This was an indictment under Rev. Stat., sect. 5440, for conspiracy to defraud the United States out of customs duties. The question involved was whether the general three-year statute of limitations was applicable, or the special five-year limitation contained in Rev. Stat., sect. 1046, applying to "any crime arising under the revenue laws." This Court held that the offense of conspiracy as defined by sect. 5440 was not a crime "arising under the revenue laws" (p. 35):

Since, then, the section, i. e., R. S. 5440, does not mention the revenue or the revenue laws, but in terms includes every form of conspiracy against the United States and every form of conspiracy to defraud them, it is difficult to see how the crimes it defines, and which are punishable under it, can be said to arise under the revenue laws. Specific acts which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; *but a conspiracy to defraud the Government, though it may be*

*directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws.*

The defendants in the court below, in the case at bar, attempted to distinguish the *Hirsch* case upon the ground that there the indictment was for a conspiracy to *defraud* the United States while here the indictment is for a conspiracy to *commit an offense* against the United States. Such a distinction is of the stuff that dreams are made of—impalpable, intangible, nonexistent. It clearly appears, in the opinion of this Court, that the indictment charged acts in furtherance of the conspiracy which were distinct offenses under the revenue laws. Nevertheless, this Court held that the case was not one arising under the revenue laws, but that it arose under the conspiracy statute. (Rev. Stat., sect. 5440.)

Two cases in the inferior Federal courts are squarely in point, and supported by the great mass of authority to the effect that conspiracy is a separate offense, entirely distinct from any offense the commission of which the conspiracy designs to effect.

*Morris Rabinowitz v. United States* (C. C. A. 2d Circ., March 9, 1915):

Defendants were indicted under sec. 37 of the Criminal Code for conspiracy to commit an offense against the United States. Prosecutions for conspiracy are regulated by the general limitation statute, section 1044 U. S. Revised Statutes, which prescribes a period of

three years. Section 29d does not modify or repeal that section. The offense "conspiracy" is not one "arising under the bankruptcy act." If Congress had intended to change the existing statutes it would have used more definite language or language inconsistent with such statutes. *U. S. v. Comstock*, 162 F. R., 416; *U. S. v. Hirsch*, 100 U. S., 33.

*United States v. Comstock*, 1908, Circ. Ct., R. I., 162 Fed., 416.

C. *General statements as to the nature of conspiracy.*

From innumerable cases maintaining the clearly established principle, the following may be specifically cited:

*United States v. Cassidy*, 1895, 67 Fed., 698. The court said, charging jury (p. 703):

The conspiracy to commit an offense is the gist of the criminality under the law. The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons, to commit crime, requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinctive from those prescribed for the crime which may be the object of the conspiracy.

*Thomas v. United States* (C. C. A., 8th Circ., 1907), 156 Fed., 897, 902:

By repeated adjudications of the Supreme Court and other courts a conspiracy to commit

a criminal offense has been held to be an entirely different thing from the substantive offense itself, and prosecutions for conspiracies to defeat the provisions of the interstate commerce act have been frequently upheld.

*Ryan v. United States* (C. C. A., 7th Circ., 1914), 216 Fed., 13, 32:

The authorities concur, as we understand their import, in these definitions of the conspiracy denounced by section 5440 R. S. (as preserved in section 37 of the Criminal Code), namely: That it is distinguishable from the common law offense of conspiracy, in that it requires for completion and conviction that "one or more of such parties do any act to effect the object of the conspiracy"; that, when so carried forward by any overt act, it constitutes an offense entirely irrespective, either of its success or of the ultimate objects sought to be accomplished by conspiring "to commit any offense against the United States"; that "liability for conspiracy is not taken away by its success, that is, by the accomplishment of the substantive offense at which the conspiracy aims"; and that the conspiracy so denounced may either intend and be accomplished by one or several acts which complete the offense, or it may be made by the parties a continuing conspiracy for a course of conduct in violation of law to effect its purposes.

See also:

*United States v. Sanche*, 1881, 7 Fed., 715, 717;

*Gantt v. United States*, 1901, C. C. A., 5th Circ., 108 Fed., 61, 62.

*United States v. Richards*, 1906, 149 Fed., 443, 446;

*Houston v. United States*, 1914, C. C. A., 9th Circ., 217 Fed., 852.

D. A person may be guilty of conspiring to commit an offense against the United States although he could not himself commit the objective offense.

*Williamson v. United States*, 1908, 207 U. S., 425, 447.

*United States v. Holte*, 1915, 236 U. S., 140;

*United States v. Bayer*, 1876, 4 Dill. 407; 24 Fed. Cas., 1046.

This was a case of conspiracy to commit an offense arising under the bankruptcy statute, similar to the conspiracy charged in the case at bar. It was contended by certain of the defendants that since no person except the person against whom bankruptcy proceedings were commenced could commit an offense under the bankruptcy law, defendants could not be indicted for *conspiracy* to commit an offense which they could not commit. But the court held otherwise, saying (p. 410):

But if it is true that none but the bankrupt can be indicted under section 5132, still it is clear that other persons can combine and confederate with him to commit the acts therein made offenses against the United States. By section 5440 conspiracies to commit any offense against the United States are made pun-



ishable, provided some act is done to effect the object of the conspiracy. *The statute is based upon the common law principle that conspiracy to commit a crime is of itself criminal*, but adds the requirement of an overt act, and the fact that one of the conspirators could not himself commit the intended offense, neither relieves him of guilt nor disables him from cooperating with another person who is able to commit it.

\* \* \* \* \*

(P. 411):

*The conspiracy and the consummated act are different offenses, in the sense, at least, that the fact that the offense has been committed is no legal bar to a prosecution for the conspiracy.*

*Cohen v. United States*, 1907, C. C. A., 2d Circ., 157 Fed., 651, 654 (writ of certiorari being denied by this Court, 207 U. S., 596);

*Kaufman v. United States*, 1914, C. C. A., 2d Circ., 212 Fed., 613, 617.

And see also especially—

*United States v. Lyman* (1911), 190 Fed., 414, 416.

E. *The object of the conspiracy need not be consummated; and in the case of a conspiracy to commit the offense of concealing, while a bankrupt, property of the bankrupt estate from the trustee, it is not necessary to aver or prove either that bankruptcy proceedings were instituted or that a trustee was actually appointed.*

In *Williamson v. United States* 1905, 207 U. S., 425, 447, this Court clearly stated the general principle:

Although it be conceded, merely for the sake of argument, that an attempt by one person to suborn another to commit perjury may not be punishable under the criminal laws of the United States, it does not follow that a conspiracy by two or more persons to prosecute the commission of perjury, which embraces an unsuccessful attempt, is not a crime punishable as above stated. *The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated.*

*United States v. Cohn*, 1906, Circ. Ct., So. Dist., N. Y., 142 Fed., 983.

This was an indictment for conspiracy to conceal assets from the trustee in bankruptcy. There was a demurrer on the ground that the date alleged for the conspiracy was prior to the beginning of bankruptcy proceedings. The court overruled the demurrer, saying (p. 983):

A conspiracy to commit a crime always, in the nature of the case, precedes the commission of the crime; and, in my opinion, it does not follow, because, at the time that a conspiracy is entered into to conceal property from a trustee, no trustee has been appointed and no proceedings in bankruptcy begun, that therefore the crime of conspiracy under section 5440 can not have occurred.

(P. 984:)

In my opinion, such a conspiracy constitutes a criminal offense. The true test is,

Could a conviction be had if no bankruptcy proceedings were ever taken? I think it could, if, in addition to the organization of the conspiracy, any of the parties to it did any act to effect the object of the conspiracy. Undoubtedly a criminal prosecution, in such a case, would be harsh and unusual, but, in my opinion, a crime would have been committed in such a case, even if no proceedings in bankruptcy were, in fact, ever taken. A conspiracy to murder joined with a single act done by the conspirators to effect the object of the conspiracy would be a crime under section 5440, and would not cease to be a crime because no murder was committed.

*United States v. Burkett* (1907), 150 Fed., 208, 213.

*Alkon v. United States* (1908, C. C. A., 1st Circ.), 163 Fed., 810, 811.

*Radin v. United States* (1911, C. C. A., 2d Circ.), 189 Fed., 568. It was *held* that it was not essential that the indictment should allege or the proof show that a trustee was actually appointed. The court said (p. 571):

*In approaching this question it is well to bear constantly in mind that this is an indictment under section 5440 of the Revised Statutes and not under section 29b of the bankruptcy act.*

\* \* \* \* \*

The words "any offense against the United States" in section 5440 have been construed to include any offense made a crime by the laws of the United States. It, therefore,

makes it a crime for two or more persons to conspire that a bankrupt shall knowingly and fraudulently conceal from his trustee property belonging to his estate in bankruptcy.

Of course this conspiracy may be entered into prior to the bankruptcy; to hold otherwise would emasculate the statute and render it abortive in its application to the bankruptcy act. After the bankrupt's property is in the hands of the court it would be well nigh impossible to carry out such a conspiracy as is here shown. This court has held that the statute applies to a conspiracy formed in contemplation of bankruptcy. *Cohen v. United States*, 157 Fed., 651, 85 C. C. A., 113. See also, *Alkon v. United States*, 163 Fed., 810, 90 C. C. A., 116.

*Roukous v. United States*, 1912, C. C. A., 1st Circ., 195 Fed., 353. (Writ of certiorari being denied by this Court, 225 U. S., 710.)

F. *It is no objection that the conspiracy may be punished more severely than the objective offense, for the offenses are separate and the evils to be guarded against are distinct.*

*Clune v. United States*, 1885, 159 U. S., 590.

This was an indictment under Rev. Stat., sec. 5440, for conspiracy to commit offense of obstructing mails, Rev. Stat., sec. 3995. The offense of obstructing mails is made punishable by a fine of not more than \$100, while conspiracy under Rev. Stat., sec. 5440, is punishable by a fine of not less than \$1,000, nor more than \$10,000, or by imprisonment for not more

than 2 years, or both. Referring to argument of counsel, this Court said (p. 595):

Upon this he contended that a conspiracy to commit an offense can not be punished more severely than the offense itself. . . . The language of the sections is plain and not open to doubt. A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan v. Wilson*, 127 U. S., 540, 555. The power exists to separate the conspiracy from the act itself and to fix distinct and independent penalties to each.

See also:

*United States v. Stephenson*, 1909, 215 U. S., 200, 203.

G. *The parties to the conspiracy may be prosecuted, even though the substantive offense at which the conspiracy aimed shall have been accomplished. The liability for conspiracy is not taken away by its success.*

*Heike v. United States*, 1913, 227 U. S., 131, 144.

- H. *The conspiracy is not merged where both the conspiracy and the offense which is its object are misdemeanors, or where both are felonies.*

*United States v. Scott*, 1905, 139 Fed., 697;

*United States v. Thomas*, 1906, 145 Fed., 74;

*United States v. Gordon*, 1890, 42 Fed., 829;

*Berkowitz v. United States*, 1899, C. C. A., 3d Cir., 93 Fed., 452.

- I. *Acquittal upon the charge of conspiracy to commit an offense against the United States does not bar a prosecution for the objective offense.*

*Berkowitz v. United States*, 1899, C. C. A., 3d Cir., 93 Fed., 452, 457. In this case, a party charged with an offense under the naturalization statute, Rev. Stat., sec. 5424, pleaded an acquittal on a charge of conspiracy to violate that statute. The court held:

The act to effect the object of the conspiracy is no part of the offense under section 5440. If there be a conspiracy to commit an offense against the United States, the offense under that section is complete, although no successful prosecution can be had without proof of an act in aid, furtherance, or accomplishment of the object of the conspiracy. The unlawful confederacy constitutes the offense.

- J. *Upon the same principle, an indictment which charges the defendants with conspiracy to commit two different offenses is not duplicitous.*

*John Gund Brewing Co. v. United States*, 1913, C. C. A., 8th Circ., 206 Fed., 386:

In case No. 3855, we have reached the conclusion, after more careful consideration and

examination of the authorities, that we were in error in holding that the indictment was duplicitous, because it charged a conspiracy to commit two distinct offenses. The law permits this if there is no duplicity charged in the conspiracy itself, for *the conspiracy is entirely distinct from the crimes or unlawful acts which the parties have in view when they enter into the conspiracy.* Parties may enter into a conspiracy to commit the crime of burglary, and, for the purpose of destroying the evidence thereof, also commit the crime of arson. While arson and burglary are two distinct offenses, punishable differently, and could not be charged in one count of an indictment, a charge of conspiracy to commit the two offenses is only one offense. The conspiracy is entirely distinct from the crimes or unlawful acts which the parties have in view when they enter into the conspiracy or the object which they intend to accomplish in pursuance of it.

#### SUMMARY.

Conspiracy, then, is an entirely separate and distinct offense from any crime or crimes which it may be the object of the conspiracy to commit. The consummation of the objective offense is not a prerequisite of criminal responsibility for conspiracy. Yet if, as a matter of fact, the objective offense is consummated, prosecution for conspiracy is not barred thereby. Conversely, acquittal upon a charge of conspiracy is not a bar to prosecution for the offense at which the alleged conspiracy aimed.

A person may be guilty of conspiracy to effect the commission of an offense by another which from the nature of the offense he could not himself commit. And it is no defense to a prosecution for conspiracy that at the time it was entered into the objective offense could not have been committed. Thus, we have seen that although under section 29b of the Bankruptcy Act only the bankrupt can commit the offense of concealing assets from his trustee, another than the bankrupt may be guilty of conspiracy with the bankrupt for the commission of the offense by the latter—and this although at the time of the conspiracy no bankruptcy proceedings had been instituted or trustee appointed—provided such conspiracy be entered into in contemplation of bankruptcy. While Revised Statutes, section 5440, Federal Penal Code, sec. 37, requires the doing of an act to effect the object of the conspiracy, it is not necessary that such act should itself be a criminal offense under some other provision of the laws. One may be guilty of a conspiracy to commit two different and independent crimes, and such conspiracy constitutes but a single offense.

It is submitted that without doing violence to these long-established principles it is impossible to hold that a conspiracy to do an act made criminal by the Bankruptcy Act is itself an "offense arising under" the Bankruptcy Act.



## III.

**Consideration of authority relied on by the defendants.**

Defendants rely on a decision by Judge Thomas in the District Court for the Southern District of New York in the unreported case of *United States v. Samuels*, in 1914, holding that the one-year period of limitation applied to an indictment for conspiracy to conceal assets under the Bankruptcy Act (copy of which opinion is to be found in the Appendix, pp. 26-29 *infra*). This is the sole express authority adverse to the Government's contention. It is radically unsound in principle, is based upon entirely insufficient reasoning, is unsupported by the cases cited in the opinion, and is contrary to authorities directly in point and apparently ignored by the judge.

Incidentally the question ought never to have been passed upon by the court at all, because the case came up upon demurrer, whereas it has frequently been held that the defense of the statute of limitations can only be made by special plea or answer. *United States v. Cook*, 1872, 17 Wall., 168, 179; *United States v. Brace*, 1906, 143 Fed., 703; *Greene v. United States*, 1907, C. C. A., 5th Cir., 154 Fed., 401, 411; *United States v. Andem*, 1908, 158 Fed., 996, 999.

Judge Thomas reasons that "in the absence of section 29d of the Bankruptcy Act the (this) court would have no jurisdiction over the alleged crime set forth in the indictment." (The court doubtless meant section 29b of the Bankruptcy Act, which defines the

offenses thereunder, and not section 29d, which is merely the special one-year limitation provision.)

The trouble with this argument is that it works both ways, and goes just as far one way as the other. While it is true that, if no offenses were enumerated in the Bankruptcy Act, there could be no prosecution for conspiracy to commit an offense against the Bankruptcy Act, it is equally true that there could be no prosecution for conspiracy to commit an offense against the Bankruptcy Act if there were no *conspiracy* statute. The argument, therefore, amounts to nothing. The learned judge might even more truthfully have said that in the absence of the *conspiracy statute* the court would have no jurisdiction over the crime alleged in the indictment. Here again the court seems to have considered that the prosecution was for one of the substantive offenses defined by the Bankruptcy Act and to have overlooked the distinction between an indictment for conspiracy and an indictment for an offense under the Bankruptcy Act.

The only authorities cited by Judge Thomas in the *Samuels* case are the cases of *In re Adams*, 171 Fed., 599, and *United States v. Phillips*, 1912, 196 Fed., 574.

Neither is a case of conspiracy; and they are cited merely upon the point of continuance of the overt act of concealment. Cases cited *supra* (pp. 9-11) directly in point are ignored by Judge Thomas.

## IV.

The decision of this case will affect not only prosecutions for conspiracy to commit an offense under the Bankruptcy Act, but also prosecutions for conspiracy to commit offenses under other acts containing special statutes of limitations applicable to offenses arising thereunder. The existence of different periods of limitation for different offenses makes impossible the application of the doctrine of the Samuels case, the adoption of which would create great confusion.

There are several statutes other than the Bankruptcy Act which contain special statutes of limitations, for example:

(1) Rev. St., sec. 1046. No person shall be prosecuted, tried, or punished for any crime *arising under the revenue laws, or the slave-trade laws* of the United States, unless the indictment is found or the information is instituted within *five years* next after the committing of such crime.

(2) Act of July 5, 1884, c. 225, sec. 1, 23 Stat. 122. No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal-revenue laws of the United States unless the indictment is found or the information instituted within *three years* next after the commission of the offense in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within *two years* in all other cases. \* \* \*

(3) Act of June 29, 1906, c. 3592, sec. 24, 34 Stat. 603, naturalization law. No person shall be prosecuted, tried, or punished for any crime *arising under the provisions of this act* unless the indictment is found or the information is filed within *five years* next after the commission of such crime.

If the rule contended for by defendants in error were to be adopted by this Court, there would be no uniform rule which would apply to prosecutions for conspiracy to commit an offense against the United States. In cases where the object of the conspiracy was the commission of an offense arising under one of the above acts, the period of limitation would have to be determined by different statutes. This rule would be utterly illogical in any case; and would have nothing whatever to support it, in a case of conspiracy where the objective offense was not in fact consummated.

Moreover, if the defendants were indicted for a conspiracy to commit two separate offenses, for each of which there was a different period of limitation provided by statute, while the authorities are unanimous to the effect that such an indictment charges but a single offense (see *supra*, p. 19), yet if the rule contended for by defendants in error were adopted, how would the period of limitation be determined in such a case? This single example is sufficient to show the impracticability of applying such a rule and the confusion which would result if it were to be perpetuated.

#### CONCLUSION.

The demurrer to the plea in bar should have been sustained by the District Court, and the judgment of that court overruling such demurrer and dismissing the indictment should be reversed.

CHARLES WARREN,  
*Assistant Attorney General.*

MARCH, 1915.

## APPENDIX.

### DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA	}	Nos. 2461-2462.
<i>v.</i>		
JACQUES SAMUELS et al.		

R. B. Wood, Esq., of New York City, assistant district attorney for the United States.

Abram J. Rose, Esq., Emanuel Jacobus, Esq., and Benjamin Slade, Esq., all of New York City, for defendants.

THOMAS, district judge:

The defendant and nine others were jointly indicted by the grand jury on February 24th, 1914, charged with a conspiracy to conceal assets from a trustee in bankruptcy in violation of sec. 29b of the bankruptcy act and with violating sec. 37 of the United States Criminal Code.

Four of the defendants, Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, are represented by counsel, and pleadings bearing various titles have been filed in their behalf. Each of these four last-mentioned defendants in his pleadings asks that the indictment, so far as it relates to him, be quashed for the reason that the acts alleged in the indictment are barred by the statute of limitations contained in section 29d of the bankruptcy act. Said section reads as follows:

"A person shall not be prosecuted for any offense arising under this act unless the indictment is found

or the information is filed in court within one year after the commission of the offense."

In my opinion the above-quoted section is determinative of the issues presented by the indictment against the aforementioned defendants who have, in their pleadings attacking the indictment, invoked the provision of said section, hence there is no occasion to determine other questions raised by pleadings, some of which are of vital importance and decisive.

As already noted, the indictment was returned February 24th, 1914. The last overt act alleged in the indictment was on November 25th, 1912.

There are no other facts alleged in the indictment which would warrant this Court in finding a continuous act of conspiracy from November 25th, 1912, to the date of the indictment, February 24th, 1914.

While it may be inferred from the language of the indictment that the concealment continued, no facts are alleged to show the continuance of the conspiracy, if one existed.

In *United States v. Phillips*, 196 Fed., 574, Judge Hough of this District after carefully analysing the cases of *U. S. v. Kissel*, 218 U. S., 601 and *U. S. v. Irvins*, 98 U. S., 450, arrived at this conclusion; that while the concealment may continue the crime of concealment was completed long before.

In the case of *In re Adams*, 171 Fed., 599, it is held that concealment must be from "a trustee." In the case at bar the indictment alleges that the trustee qualified on November 4th, 1912. The last overt act alleged in the indictment was twenty-one days later, to wit, on November 25th, 1912.

It is therefore apparent from the language of the indictment that more than one year elapsed after the appointment of the trustee and after the date of the

last overt act alleged therein before this indictment was found or filed in Court against these defendants.

If the statute of limitations provided for in the bankruptcy act, section 29d is controlling, then these indictments should be dismissed as against the four defendants invoking the protection of that statute.

I find nothing in the language of these indictments that warrants a conclusion other than that the offenses therein described were offenses against the bankruptcy act, and as such should be dealt with according to the plain provisions of that act, one of which, section 29d, is a statute of limitation which effectually bars a prosecution of these defendants invoking its protection. The learned district attorney contended that the limitation contained in section 29d does not apply, and claimed that the limitation imposed in sec. 1044 of the Revised Statutes should govern. I can not subscribe to this contention. In the absence of section 29d of the bankruptcy act this Court would have no jurisdiction over the alleged crimes set forth in the indictment. If Congress intended that section 29d should apply to the offenses specifically enumerated in the entire section, appropriate language, in my opinion, would have been adopted. For example, if subdivision 29d read "a person shall not be prosecuted for any of the *foregoing* offenses," etc., then the Government's claim would have some force, but the subdivision in question reads, in part, "for *any* offense arising under this act." The alleged offense recited in the indictments necessarily arose out of the bankruptcy act and not under some other law of the United States. Hence, the limitation found in section 29d applies.

I therefore find that no lawful indictments were found against Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, or either of them within one year after the offenses alleged in the indictments, and that their prosecution is barred by section 29d of the bankruptcy act. These indictments are therefore dismissed as to each and all of them.

Let an order to that effect be entered.

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No. 748.

Office Supreme Court, U. S.  
FILED  
MAR 31 1915  
JAMES D. MAHER  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1914.

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THE UNITED STATES, *Plaintiff in Error*,  
*vs.*  
WILLIAM RABINOWICH, *Defendant in Error*.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

BRIEF FOR DEFENDANT IN ERROR.

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WILLIAM R. HARR,  
CHAS. H. BATES,  
*Attorneys for Defendant in Error.*

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IN THE  
Supreme Court of the United States

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OCTOBER TERM, 1914.

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THE UNITED STATES, Plaintiff in Error, vs. WILLIAM RABINOWICH, Defendant in Error.	}	No. 748.
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In error to the District Court of the United States  
for the Southern District of New York.

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BRIEF FOR DEFENDANT IN ERROR.

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**STATEMENT OF CASE.**

~~from~~ This matter comes before this court upon a writ of error <sup>to</sup> the United States District Court for the Southern District of New York to review an order of said District Court ~~sustaining a demurrer to~~ <sup>dismissing</sup> an indictment found June 24, 1912.

The indictment is in two counts, each of which undertakes to charge a conspiracy on the part of the defendant in error and others to commit an offense against the United States described in section 29b of the Bankruptcy Act, to wit—that the bankrupt conceal from his trustee property belonging to his estate in bankruptcy.

In both counts, the conspiracy and all the overt acts alleged are stated to have taken place in March, 1911, more

than one year previous to the date of the finding of the indictment. In neither count is the conspiracy averred to be a continuing one.

The defendant in error filed a special plea in bar, on the ground that the indictment was not found within one year after the commission of the offense, as required by section 29d of the Bankruptcy Act, which plea was sustained by the court and the indictment dismissed. Thereupon the United States sued out this writ of error.

The Government contends that the period of limitations in a case of this kind is three years, under the general statute of limitations contained in Section 1044 of the Revised Statutes.

### STATUTES INVOLVED.

Section 37 of the Criminal Code (Sec. 5440 of the Revised Statutes) :

"Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 29b of the Bankruptcy Act of 1898:

"b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy."

Section 1044 of the Revised Statutes:

Sec. 1044. No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section one thousand and forty-six [which fixes a five year period of limitation for crimes arising under the revenue and slave-trade laws], unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of the existing laws."

Section 29d of the Bankruptcy Act:

"d A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

## ARGUMENT.

### POINT I.

The decision of the District Court is in accord with the purpose of Congress, as expressed in the Bankruptcy Act itself, in respect to the period of limitation for the prosecution of offenses growing out of the passage of that Act, and a ruling to the contrary would defeat that purpose.

The manifest purpose of Congress in Section 29d of the Bankruptcy Act was to cast into oblivion, after the lapse of one year, *all* offenses having their *source* in that Act. Hence the broad language of Section 29d:

“A person shall not be prosecuted for ANY offense ARISING under this Act,” etc.

The verb “arise” is so common as hardly to require definition. The Standard Dictionary defines it as follows:

1. *To begin existence or active existence; become known or noticeable; spring forth; originate; appear.*

The conspiracy offense set forth in this indictment depends for its very existence on the Bankruptcy Act. It could not have sprung forth, appeared or become noticeable by the courts but for the Bankruptcy Law. Therefore it cannot be successfully argued that it did not “ARISE” under the Bankruptcy Act.

Bankruptcy laws, as the history of such statutes in this country shows, are sporadic in character and liable to be repealed at any time; hence the advisability of granting quick repose to offenses arising thereunder. Congress recognized this situation when it lessened the usual period of limitations in the case of offenses arising under the present Bankruptcy Act.

All the important limitations contained in the Bankruptcy Law are one year:

1. Claims cannot be proved after one year. (Sec. 57n.)
2. Dividends unclaimed one year, shall be redistributed. (Sec. 66b.)

3. Discharges can only be applied for within one year. (Sec. 14.)

4. Suits against bankrupts are stayed one year. (Sec. 11.)

5. Cases under certain circumstances deemed closed after one year. (Rule IX, Southern District of New York.)

6. All crimes arising under the law are barred in one year. (Sec. 29d.)

Ever since the abolition of imprisonment for debt, offences arising out of insolvency have received separate and different treatment, as being of a less degree of criminality than the ordinary cases of violence or moral turpitude.

To say that, although *the bankrupt* is absolved from prosecution for concealing his property from the trustee in bankruptcy after the lapse of one year (*United States v. Phillips*, 196 Fed. 574; *Warren v. United States*, 199 Fed. 753), as also any one who aids or abets him in such concealment (Sec. 332, Crim. Code; *Kaufman v. United States*, 212 Fed. 613), yet that he and others may still be prosecuted thereafter for conspiring to commit such offense, presents an anomaly that is wholly inconsistent with the purpose of Congress as declared in Section 29d of the Bankruptcy Act.

## POINT II.

**A "conspiracy to commit an offense against the United States" cannot arise unless there is a statute creating said offense; hence it is that statute, rather than the conspiracy statute, which "gives rise" to the conspiracy offense.**

The conspiracy statute deals with two classes of conspiracy—one, "*conspiracies to commit an offense against the United States*," and the other "*conspiracies to defraud the United States*." We are here concerned only with the first class of conspiracies, which differ materially from the second class.

A conspiracy to commit an offense created by a law of the United States necessarily originates, arises out of and



springs from *that* law as its source and foundation. Without a law creating the substantive offense of concealing the assets of a bankrupt from his trustee, a conspiracy to do the acts set forth in this indictment would be neither cognizable nor punishable by the courts.

To illustrate: The conspiracy statute here in question was enacted in 1867, and was in existence during the years 1879 to 1897, when there was no bankruptcy statute. It would therefore have been impossible during those years to commit the crime here set forth. It needs only this statement to demonstrate that the very existence of such an offense depends as much on the Bankruptcy Act as the birth of a child necessitates the existence of parents to bring it into being.

If the conspiracy here involved was of that character of crimes which depend solely on the conspiracy statute for their creation, of course it could not be said that the "offense" charged arose out of any other statute. The only conspiracies depending solely on the conspiracy statute for their existence are those covered by the second part of Section 37 of the Criminal Code, namely, "*conspiracies to defraud the United States.*" The other class of conspiracies covered by that statute depend for their very being upon the existence of a statute making the object of the conspiracy a criminal offense.

The distinguishing difference is that "*offenses*" against the United States must be created by *positive statutory enactment* (*United States v. Wupperman*, 215 Fed. 135), while the "*frauds*" against the United States need not be. The latter come under the principle that the power is inherent in sovereignty to protect itself against fraud, either in respect to the collection of its revenues or otherwise; but under our system of government a *crime* must be denounced upon the statute books of the nation in order to make it punishable.

An "offense" of to-day may not be one to-morrow, and actions which have been legal and lawful for centuries may

become an "offense" to-day or to-morrow on the passage of a law designating them as such.

Until the Bankruptcy Law was passed, it was no offense cognizable by the courts to conceal assets from a trustee of an insolvent who was acting for the benefit of creditors, and hence a conspiracy to do that thing was not punishable.

### POINT III.

The controlling fact is not, as the Government contends, that "conspiracy to commit an offense against the United States" is separate and distinct from the offense which is the object of the conspiracy. The question still remains whether said conspiracy offense **ARISES** under the Bankruptcy Act within the meaning of the special statute of limitations contained therein.

### POINT IV.

The bar of the Bankruptcy statute is not limited to offenses which are **ENUMERATED** or **FULLY DEFINED** in the Bankruptcy Act, but extends to **ALL** offenses **ARISING** under that Act.

### POINT V.

The provisions of the Bankruptcy Act must be included in the description of the conspiracy offense and hence form a component part of said conspiracy offense.

An indictment for conspiracy to commit an offense denounced by the Bankruptcy Act must contain every allegation necessary to sustain an indictment for the commission of the substantive offense which is the object of the conspiracy.

In *United States v. Comstock*, (162 Fed. 415) District Judge Brown, after stating that the indictment was under 5440 of the Revised Statutes for conspiracy, said, in sustaining a demurrer to the indictment:

"In Section 29b punishment is provided upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy. . . .

“The words ‘knowingly and fraudulently’ are an essential part of the statute, and describe an essential ingredient of the offense. The omission of these words, or any equivalent, is, in my opinion, fatal on demurrer.”

It thus appears that an indictment for conspiracy to conceal the assets of the bankrupt from his trustee, in violation of Section 29b of the Bankruptcy Act, must allege all the elements constituting the objective offense **AS A PART OF THE CONSPIRACY OFFENSE.**

Therefore, the Bankruptcy Law is not merely the place whence the offense arises, **BUT ITS PROVISIONS FORM A COMPONENT PART OF THE CRIME CHARGED, AS WITHOUT THEM THE INDICTMENT IS DEMURRABLE.**

Let us suppose the question was whether the facts stated in an indictment for conspiring to conceal a bankrupt's assets charged an offense against the United States within the meaning of the provision of the Bankruptcy Act defining said offense of concealment; that the District Court had decided that question adversely to the Government, and the case had been brought here, under the Criminal Appeals Act, upon the ground that the case involved the construction of the statute upon which the indictment was founded. Would it not be held, for the purpose of such an appeal, that the provision of the Bankruptcy Act whose construction was involved was the statute upon which the indictment was founded? (See opinion upon second count of indictment in *United States v. Keitel*, 211 U. S. 370, 375.) But how could the indictment for conspiring to conceal a bankrupt's assets be *founded* upon the Bankruptcy Act, in any proper sense, and yet the offense charged be held not to *arise* under that Act?

It is of course true that there could be no offense without the conspiracy statute, but the point is that the conspiracy statute is <sup>incomplete</sup> ~~incomplete~~ in itself; that it is the Bankruptcy Act which renders the conspiracy statute operative;

and that we are dealing with a special statute of limitations which applies to all offenses growing out of the passage of the Bankruptcy Act.

## VI.

**The offense of conspiring to have a bankrupt fraudulently and knowingly conceal his property from the trustee in bankruptcy not only arises under the Bankruptcy Act but is part and parcel of it, as fully as if expressly written therein.**

When Congress wrote into the Bankruptcy Act the provision making it an offense for the bankrupt fraudulently and knowingly to conceal his property from the trustee, *it did so with knowledge of the fact that the general conspiracy statute existed and that the result would be that conspiring to conceal the bankrupt's property from the trustee would also become an offense under the Bankruptcy Law.* It thus, in effect, created two distinct offenses under the Bankruptcy Act, with one stroke of the pen, each designed alike to insure the due observance of the requirements of that Act. It was unnecessary, under the circumstances, actually to write the conspiracy offense into the Bankruptcy Act, but the result is exactly the same as if it had done so. **NOTHING WOULD BE ADDED TO THE BANKRUPTCY ACT NOW IF CONGRESS SHOULD AMEND THE ACT BY MAKING IT AN OFFENSE FOR TWO OR MORE PERSONS TO CONSPIRE TO CONCEAL THE PROPERTY OF THE BANKRUPT FROM THE TRUSTEE. THAT PROVISION IS ALREADY, IN EFFECT, PART AND PARCEL OF THE BANKRUPTCY LAW;** and such conspiracy offense will continue to exist so long and so long only as the provision of the Bankruptcy Act making it an offense for the bankrupt to conceal his property exists, and will disappear with the repeal of the Bankruptcy Act.

### POINT VII.

**This is a case for the application of the principle that where there is a general and a special statute dealing with the same subject the special statute controls.**

We have here a general statute prescribing the periods of limitation for offenses against the United States, and a special and later statute providing a lesser period of limitations for any offense arising under that act.

Necessarily, under the well-settled principle of statutory construction above mentioned, the period of limitation fixed by the bankruptcy statute governs.

The case of *Wechsler v. United States*, (158 Fed. 579; 19 Am. B. R. 1; C. C. App. 2d Cir.,) is a good illustration of the operation of the principle just referred to. That was an indictment for perjury, committed in a bankruptcy proceeding. The indictment was framed under section 5392 of the Revised Statutes, the general perjury statute, under which a fine of not more than two thousand dollars and imprisonment at hard labor for not exceeding five years might be imposed; but it was contended that the offense charged was also covered by Sec. 29 of the Bankruptcy Act, which provided that a person having knowingly and fraudulently made a false oath in bankruptcy proceedings should be punished for a period not exceeding two years.

The Circuit Court of Appeals for the Second Circuit held that the indictment, in the *Wechsler* case, was good under either statute (citing *Williams v. United States*, 168 U. S. 389), and upon the question as to the penalty to be imposed, said, speaking by Judge Lacombe:

“ . . . We have then an offense covered by two penal sections, the earlier one imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent tribunal, officer or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such state-

ments only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the citation of authorities; the later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender upon conviction, shall be subjected to a different penalty."

We submit that this is also a case where the special and later statute, dealing with the particular subject-matter, rather than the earlier and more general statute, should be held to apply.

In this connection the decision of this court in *Phillips v. Grand Trunk Western Ry. Co.*, decided March 15, 1915, is pertinent. The court there held that the provisions of the general Conformity Act (Sec. 914, Rev. Stat.) must yield to the purpose of Congress as expressed in the special statute of limitations contained in the Hepburn Act, to the effect that all complaints for the recovery of damages should be filed with the Interstate Commerce Commission within a certain time.

The point is that we are dealing with a STATUTE OF REPOSE, contained in the Bankruptcy Act itself and applying to all offenses arising thereunder, and that the offense here in question has its INCEPTION in the provision of the Bankruptcy Act making it an offense for a bankrupt to conceal his assets from the trustee, THE PURPOSE OF CONGRESS IN CREATING THE CONSPIRACY OFFENSE BEING THE SAME AS THAT IN CREATING THE OBJECTIVE OFFENSE, namely, to insure the due observance of the Bankruptcy laws.

It will be observed that Section 1044 of the Revised Statutes excepts from its operation offenses barred by the provisions of *existing* laws. This was necessary because otherwise, being a later statute than the existing laws, Sec-

tion 1044 might be presumed to modify or repeal them. Such action on the part of Congress is in effect a recognition that the special periods of limitation prescribed for certain offenses in other statutes should continue to apply. As to subsequent statutes of that character no saving clause was necessary, as the later and special statute would, under well settled rules of statutory construction, necessarily control.

#### POINT VIII.

**UNITED STATES vs. HIRSCH, 100 U. S. 33, relied on by the plaintiff in error, was a case of conspiracy to defraud the Government, and the hypothesis upon which that decision rests is not applicable to conspiracies to commit an offense against the United States.**

The conspiracy charges in the *Hirsch* case were for *conspiracy to defraud* the United States out of the duties on certain merchandize imported into the United States, while here the charge is *conspiracy to commit an offense* against the United States created by the Bankruptcy Act.

As already pointed out, there is a vital difference between the two cases. *Conspiracy to defraud* the United States is not dependent upon the fraud which is the object of the conspiracy being itself created by law "*an offense*" against the United States; while there can be no *conspiracy to commit an offense* against the United States unless the object of the conspiracy is itself made a crime by express statute.

Although the language of the court in the *Hirsch* case is somewhat general, nevertheless the fact remains that the court was dealing only with conspiracy *to defraud* the United States, and decided the case before it upon the proposition that the conspiracy statute alone fully covered *that* offense. Thus, referring to the conspiracy section of the Revised Statutes, the court said (100 U. S. page 35):

"\* \* \* Specific acts which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; but a conspiracy to de-



*fraud the Government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws."*

It is only of "conspiracies to defraud the government" that it is possible to rely entirely upon the conspiracy statute for their prosecution and punishment.

It is true, as said in the *Hirsch* case, that the conspiracy is the *gravamen* of the offense. But the question is, what constitutes the conspiracy? It must be a conspiracy to do something; and where, as here, the conspiracy charged is "*conspiracy to commit an offense against the United States*," the object of the conspiracy—the crime against the United States—is part of the *gravamen* of the conspiracy offense. The "*gravamen*" of such a conspiracy cannot exist without the creation of the objective offense by express statute.

#### POINT IX.

**While there is some diversity of opinion among the lower Federal courts, the best reasoned cases hold that the special statute of limitations contained in the Bankruptcy Act applies to the offense of conspiring to violate the provisions of that statute.**

In *United States v. Samuels*, decided in October, 1914, Judge Thomas, of Connecticut, while sitting in the Southern District of New York, said of an indictment similar to the one at bar:

"I find nothing in the language of these indictments that warrants a conclusion other than that the offenses therein described were offenses against the Bankruptcy Act and as such should be dealt with according to the plain provisions of that act, one of which, Section 29d, is a statute of limitation which effectually bars a prosecution of these defendants invoking its protection. The learned District Attorney contended that the limitation contained in Section 29d does not apply, and claimed that the limitation imposed in Section 1044 of the Revised Statutes should govern. I cannot subscribe in this contention.



"In the absence of Section 29 of the Bankruptcy Act this Court would have no jurisdiction over the alleged crime set forth in the indictment. *If Congress intended that Section 29d should apply only to the offenses specifically enumerated in the entire Section, appropriate language, in my opinion would have been adopted.* For example if subdivision 29d read 'a person shall not be prosecuted for any of the foregoing offenses' etc., then the Government's claim would have some force, but the subdivision in question reads, in part, 'for any offense arising under this act'.

"The alleged offense recited in the indictments necessarily arose out of the Bankruptcy Act and not under some other law of the United States, hence the limitation found in Section 29d applies."

*United States v. Comstock*, 162 Fed. 416, which is to the contrary, can have little or no weight. Not only was the indictment in that case dismissed for another reason, (see same case, 162 Fed. 415) but the opinion of the court contains no discussion of the question we are considering, and merely cites the *United States v. Hirsch*, 100 U. S. 33, as decisive thereof, without noting the distinction between the two cases.

In *United States v. Morris Rabinowitz*, (not related to defendant in error), recently decided by the Circuit Court for the Southern District of New York, the only words relative to this question are:

"Defendants were indicted under Sec. 37 of the Criminal Code of conspiracy to commit an offense against the United States. Prosecutions for conspiracy are regulated by the general limitation statute, Sec. 1044, U. S. Rev. Stat., which prescribes a period of three years. Sec. 29d does not modify or repeal that section. The offense, conspiracy, is not one 'arising under the Bankruptcy Act.' If Congress had intended to change the existing statutes it would have used more definite language or language inconsistent with such statutes." *United States v. Comstock*, 162 F. R. 416; *United States v. Hirsch*, 100 U. S. 33.

It will be observed that this decision merely "begs the question", when it says that "the offense, conspiracy, is not one arising under the Bankruptcy Act." The court overlooks entirely the fact that the offense charged was not simply "conspiracy" or "conspiracy to defraud the United States", but "conspiracy to commit an offense against the United States", to wit, to violate the Bankruptcy Act; and the citation which said opinion makes of the *Comstock* and *Hirsch* cases, without discussion or analysis, further illustrates the off-hand way in which the question was disposed of in that case.

In the opinion just quoted the court says:

"If Congress had intended to change the existing statutes it would have used more definite language or language inconsistent with such statutes."

We respectfully ask what language could be used more inconsistent with such statutes than to say "a person shall not be prosecuted for ANY offense ARISING under this Act unless the indictment is found or the information is filed within one year after the commission of the crime." Could anything be broader? What words in the English language are plainer? Besides, isn't just the opposite inference true, as stated by Judge Thomas, in *United States v. Samuels*?—

"If Congress intended that Section 29d should apply only to the offense specifically enumerated in the entire Section, appropriate language, in my opinion, would have been adopted."

#### POINT X.

**The decision of the District Court tends to produce greater uniformity in the administration of the criminal laws.**

It is clearly more in accord with the impartial administration of justice to hold that a conspiracy to commit an offense—which means simply an agreement to commit some specific act which the law does not wish done—shall be barred from prosecution when the act itself, if committed, is barred.

It is true that this court has held that a conspiracy may be a continuing offense (*United States v. Kissel*, 218 U. S. 601); but, as above stated, the indictment in this case does not even attempt to charge a continuing offense; and this court has also held that the offense of concealing property from a trustee in bankruptcy is not a continuing offense, but is complete when the concealment occurs (*United States v. Irvine*, 98 U. S. 450; *United States v. Kissel*, 218 U. S. 607).

It is also true that this court has held that the liability for conspiracy is not taken away because of the commission of the substance offense (*Heike v. United States*, 227 U. S. 144), although Justice Holmes, in his dissenting opinion in the case of *Brown v. Elliott*, 225 U. S. 404, intimated that "some misgivings may be felt as to the justice of indicting for a conspiracy to do what has actually been done."

But this court has not as yet distinctly held that a conspiracy to commit a specific offense against the United States may be prosecuted although it appears from the record not only that the offense itself has actually been committed *but that prosecution therefor is barred by limitations*, as is the case in the case at bar. And even if the court would so hold upon this point, yet *where, as here, the statute creating the offense which is the object of such a conspiracy, not only purports to deal comprehensively with a particular subject-matter, but also expresses the determination that all offenses ARISING under that Act shall be barred within a comparatively short time*, it is manifestly the duty of the courts to give effect to such language on the part of the legislature and to hold that a conspiracy to do a thing prohibited by such an Act is barred from prosecution when the prosecution for the commission of the unlawful act is barred.

The lack of uniformity will be as much and the discrimination greater and more unjust if different periods of limitations be held to apply in cases of a like character, such

as concealing or attempting to conceal a bankrupt's property from the trustee in bankruptcy, and conspiring to do that thing.

"Statutes of limitations are beneficial statutes. The interests of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning." *United States v. Kissell*, 173 Fed. 828.

### SUMMARY.

Conspiracy to conceal the property of a bankrupt from the trustee in bankruptcy is unquestionably an offense growing out of the passage of the Bankruptcy Act. It is the Bankruptcy Act which vitalizes the conspiracy statute and makes possible the conspiracy offense. The Bankruptcy Law forms a component part of said conspiracy offense, the indictment being demurrable if the conspiracy charge does not contain the essential allegations of the Bankruptcy statute.

Said conspiracy offense is as much a part of the Bankruptcy Law as if expressly written thereon. When Congress passed the Bankruptcy Act and made it an offense for a bankrupt to conceal his property from the trustee in bankruptcy, it thereby created the offense of conspiring to conceal such property, which before did not exist, and which will continue to exist only so long as the Bankruptcy Act exists. Both offenses are alike designed (through their punishment) to insure the due administration of the Bankruptcy Law.

A special statute of limitation designed to cover a particular subject should be applied in a case relating to that subject, rather than a general statute of limitations dealing with every kind of offense. Section 29d of the Bankruptcy Act applies in terms to all offenses growing out of its pro-

visions and should be interpreted to carry out the purpose of Congress to cast into oblivion all offenses arising under the Bankruptcy Act after the lapse of one year. It would be a "strained interpretation, based on subtle and refined reasoning", contrary to the spirit of the Act and subversive of the expressed purpose of Congress, to say that the instant charge is not included in that category.

### THE GOVERNMENT'S BRIEF.

The brief for the Government (p. 5) proceeds upon the theory that the conspiracy offense charged is a separate and distinct offense, entirely independent of the Bankruptcy Act, and dependent alone upon the conspiracy statute for its origin and prosecution.

If this proposition could be maintained, we would admit the soundness of the Government's contention that the general statute of limitation applies. True, the offense of conspiring to conceal a bankrupt's assets is distinct from that of concealing them, but the fact that they are two separate and distinct offenses does not prove that the conspiracy offense does not arise under the Bankruptcy Law.

But the Government cannot sustain the vital part of said proposition, namely, that the conspiracy offense here charged is independent of the Bankruptcy Act and dependent alone upon the conspiracy statute, as is the case in conspiracy *to defraud* the United States. If the offense of conspiring to commit a certain crime created by the Bankruptcy Act is independent of that Act, then said conspiracy offense would arise and exist without reference to the Bankruptcy Act. But manifestly this is not so. It is necessary, as above shown, to go to the Bankruptcy Act for the full definition and description of the conspiracy offense, and it is unquestionably the Bankruptcy Act, acting upon the general conspiracy statute, which brings into being this particular conspiracy offense.

The Government's brief ignores (as it necessarily must) the nature of the conspiracy offense and the relationship

which it bears, together with all other Bankruptcy offenses, to the due administration of the Bankruptcy Laws. As above stated, when Congress made it an offense for a bankrupt to conceal his assets, it at the same time (as Congress must be presumed to have known, in view of the existence of the conspiracy statute) created the offense of conspiring to conceal such assets, and therefore it was unnecessary to write the latter offense expressly into the Bankruptcy Act. Both offenses are equally bankruptcy offenses, and both have the same object in view, namely, to insure the due observance of the administrative features of the Bankruptcy Law.

The brief for the Government says (p. 10) that there is no distinction between a conspiracy to commit a certain offense against the United States and a conspiracy to defraud the United States. But mere assertion, however eloquent, is not argument, and this proposition of the Government, like the former, will not bear analysis. As above stated, and as held by this court in the *Hirsch* case, *conspiracy to defraud* the United States rests upon the conspiracy statute alone, but *conspiracy to commit a certain offense defined by a statute of the United States forces us to go at once to that statute for the full definition and description of the conspiracy offense*. The offense is not as Government counsel seems to argue, "conspiracy", but "*conspiracy to commit a certain offense against the United States.*"

The fallacy in the argument of counsel for the Government appears from his attempt to place the *Hirsch* case on all-fours with the case at bar. In the *Hirsch* case, he says, "It clearly appears that the indictment charged acts in furtherance of the conspiracy which were distinct offenses under the revenue laws. Nevertheless, this court held that the case was not one arising under the laws, but that it arose under the conspiracy statute" (see Govt. Brief, p. 10). This is true, but the point is that counsel for the Government is confusing the *overt acts* charged in the *Hirsch* case,

with the *conspiracy offense*. The overt acts are of course no part of the conspiracy offense, and hence this court said, in the *Hirsch* case, that the fact that the overt acts charged constituted offenses against the revenue laws did not make the conspiracy offense arise under those laws. The *gravamen* of the offense is the conspiracy. But the *object* of the conspiracy is a part of the conspiracy offense and therefore a part of the *gravamen* of said conspiracy offense. And it follows that where the object of the conspiracy is to violate a certain law of the United States, that law is part and parcel of the conspiracy offense, and, as we have seen, gives rise thereto.

#### CONCLUSION.

For the reasons stated, the judgment of the District Court should be affirmed.

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